2011 WL 11027377 (Ky.App.) (Appellate Brief)
Court of Appeals of Kentucky.

John Jackson ROBBINS, Jr., Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.

No. 2010-CA-001969-MR.
March 7, 2011.

(encompassing Reply for 09-CA-2178)
Appeal from Jefferson Circuit Court Case No. 07-CR-2001

Brief of Appellant

Jeffrey M. Blum, Esq., Law Offices of Jeffrey M. Blum, 7106 Meadow Ridge Drive, Louisville, KY 40218, Phone (502) 495-1206, Fax (502) 749-4888, Cell Phone (502) 494-2889.

TABLE OF CONTENTS

TABLE OF CONTENTS

Introduction

This appeal and its companion appeal, 2009-CA-2178, arise from the Hon. Irv Maze's repeated denials of Appellant Robbins' RCr 11.42, CR 59.05 and CR 60.02 motions to set aside his *Alford* plea and resulting conviction pursuant to which he is serving a ten-year sentence on charges of **abuse**/neglect, theft and exploitation of his mother, Harriet Robbins. Mrs. Robbins, who was kept from contacting her son and denied the opportunity to know what was happening with his prosecution, has consistently maintained that these crimes never occurred. [1] The briefs on appeal show no disputed issues of fact, but a major disagreement over the applicability of established federal constitutional law to criminal prosecutions conducted in Jefferson County. The four central questions are:

May the Commonwealth obtain criminal convictions by misrepresenting the elements of a statutory offense in order to elicit an Alford plea that admits only to engaging in lawful conduct but nevertheless convicts the defendant of an actual crime?

Is an Alford plea a knowing and intelligent guilty plea when a defendant knows he is pleading guilty to three named offenses and recites that his plea is knowing and intelligent, but is unaware that the conduct to which he is admitting does not violate the statutes under which he is being convicted?

Is it appropriate for courts to sustain a plea and conviction obtained through multiple violations of due process by confining their inquiry to statements made at a *Boykin* hearing when the surrounding circumstances show that the defendant's conclusory statement about understanding the charges could not possibly be true?

Is it appropriate for courts to sustain a plea and conviction by correctly quoting the applicable legal standards while paying no attention to the surrounding circumstances that those legal standards say should control the decision?

Statement in Support of Oral Argument

Appellant hereby adopts by reference the Statement in Support of Oral Argument contained in Appellant's brief in the companion appeal, 2009-CA-2178

STATEMENT OF POINTS AND AUTHORITIES

Statement of the Case

RCr 11.42 1, 10, 12,14

CR 60.02 1, 10, 11-12

CR 59.05 1,12

KRS 209.990(5) 1,5

KRS 209.020(9) 1

KRS 209.020(16) 1,5

KRS 209.990(2) 5

Wylie v. Commonwealth, 556 S.W.2d 1,2 (Ky. 1977) 6

Thomas v. Commonwealth, 931 S.W.2d 446, 449 (Ky. 1996) 6

RCr 8.18 6,7

RCr 6.10 6,7

ARGUMENT

1.The Purpose of Kentucky's Liberal Standard Regarding Pleading of Elements in an Indictment Is Not to Encourage the Fundamental Violations of Due Process that Would Become Commonplace if the Commonwealth's Various "Waiver" Arguments Were Accepted, But to Allow Flexibility Regarding the Point at Which an Intelligible Charge is Presented to the Defendant.

Stark v. Commonwealth, 828 S.W.2d 603 (Ky. 1992) 14

Thomas v. Commonwealth, 931 S.W.2d 446 (Ky. 1996) 14-16

Wylie v. Commonwealth, 556 S.W.2d 1,2 (Ky. 1977)

KRS 209.020(16) 16

Casey v. Commonwealth, 994 S.W.2d 18, 22 (Ky. 1999)

II. Appellee's "Waiver of RCr 6.10 Rights" Argument is Defeated by Both the Palpable Error Doctrine of RCr 10.26 and the Established Standards of What Constitutes a Valid Guilty Plea.

A. The Violations of Due Process Were Sufficiently Egregious as to Constitute Palpable Error.

RCr 10.26 16-17

Mason v. Commonwealth, 2011 Ky. Lexis 3 (January 20, 2011) 17

1 *Statement of the Case

The Bait and Switch Prosecution and Actual Innocence of John Robbins

From all indications in the case file it appears that the instant conviction of John Robbins on charges of exploitation, theft and criminal neglect was obtained by using a bait and switch prosecution. An Alford plea was elicited whereby Robbins admitted to the conduct that he was alleged to have committed. But the conduct consisted of lawful acts that he had done-e.g., using money from bank accounts in his mother's name with her permission "for his own purposes." Nevertheless, and without telling Robbins, the Commonwealth performed a switch and pretended that the lawful conduct that he had admitted doing was the same as unlawful conduct that violated a criminal statute.

So, for example, the lawful behavior of using freely given assets for one's own purposes was substituted for the unlawful acts of obtaining assets by deception or intimidation in order to concoct an "exploitation" charge. KRS 209.990(5), 209.020(9). The lawful behavior of simply making bank withdrawals that were approved by the banks because they had a legal Power of Attorney on file (APX pt. 1 at 38) was equated with "theft," and the true offense of criminal neglect, which consists of causing medical injury by depriving a dependent person of "goods or services that are necessary to maintain his health or welfare," KRS 209.020(16), was deemed to have resulted from a sudden flare up of an inherited condition while Appellant was out of town for two days. APX pt. 2 at 12-15, 18-24.

The statutory definition of criminal neglect contrasts vividly with Robbins' trial counsel's description of how "criminal neglect" was conceptualized for John Robbins:

> Mr. Robbins entered an Alford plea as it related to the above referenced ***2** matter. **At no point was Mr. Robbins deemed to have caused any medical injury to his mother,** Harriet Robbins. It was clearly understood by all parties that **Mrs. Robbins suffered from a previous condition that was aggravated while Mr. Robbins was not present in the homestead.**

Letter from Attorney Alex Dathorne to Inmate Records at WKCC on February 11, 2009: APX pt. 2 at 25 (emphasis supplied). The Commonwealth's Statement of Facts of the Case ("Statement of Facts") that was read to Robbins during his Boykin hearing (APX pt. 1 at 28-29) focused on an incident in late November, 2006 when Harriet Robbins was taken out of her home because she had swelling and visible sores on her legs. But if this was the factual basis of the **abuse**/neglect charge, John Robbins' absence could not plausibly have provided grounds for an actual criminal neglect charge because he was gone for two days and stayed in cell phone contact with his mother who had another hired caretaker with her the entire time. See Affidavits of John Robbins and Rebecca Lee Schone, APX pt. 2 at 18-24, 9-15, respectively.

The Commonwealth's Attorney may have had something broader in mind because the indictment (APX pt. 1 at 44-48) alleged only that John Robbins "knowingly permitted the victim's medical condition to worsen without seeking appropriate care for her" at some time or times during a fourteen month-period. How and when he did this was never made clear. But there is a big difference between allowing a person's medical condition to deteriorate by holding them in captivity and depriving them of food or water, as opposed to merely deferring to the wishes of a competent but headstrong **elderly** parent. Harriet Robbins, the ostensible victim, described the situation as follows:

> ***3** On my own, I refused to go to a nursing home, or to doctors. My ex-husband was a doctor, and doctors have never done me much good. John fixed meals for me for many years. John has always made me the priority in his life. When I die, I wanted everything I have to go to John, and this has been in my will for forty years or more. I always lend money to John when he needs it, and he was my power of attorney. I will gladly pay his personal legal expenses because I want John to be home with me.

Letter from Harriet Robbins dated December 16, 2007. APX pt. 1 at 64. Sharp variances between statutory definitions and facts alleged for John Robbins' prosecution tainted his conviction on each of the three substantive charges. See illustrative table contained on page 19 of Appellant's brief in the companion appeal, 09-CA-2178. Hence the Commonwealth sought refuge in ambiguity and relied on threats of exorbitant sentencing and attempts to elicit fear about what could be in 1,326 pages of discovery that Robbins was never shown to get him to "cooperate" and enter an Alford plea that acknowledged his actual conduct. Even though Robbins correctly maintained his innocence in light of the behavior he was acknowledging, the Commonwealth converted the plea into an admission of guilt by strategically overlooking the fact that his admissions did not satisfy the elements of the offenses with which he had been charged.

On Appeal the Commonwealth seeks to defend this practice in two ways. First, like Judge Maze, below, it relies on the fact that Robbins was required, as a condition of having the Court accept his *Alford* plea [2], to give an affirmative answers to the question:

***4** Do you believe the Commonwealth could present evidence of all these facts to a jury, so that jury, hearing this evidence, could believe beyond a reasonable doubt that this conduct was committed by you?

(APX pt. 1 at 28-29). But the phrase *"all these facts"* referred only to a single paragraph that combined lawful acts actually done by John Robbins with erroneous legal characterizations that created a false impression he was pleading to the elements of statutory offenses with which he was being charged. The single paragraph stated in full:

> JUDGE: Okay. So with that in mind, the facts in this case set out here say that in Jefferson County between February 6, 2006 and April 6, 2007, the defendant, that being you, John Robbins, Jr., had assumed the role of caretaker of the victim, Harriet Robbins, who is an 81 year old and physically and mentally disabled. During that time, the defendant, again that being you, **financially** exploited the victim by utilizing her funds for his own purposes on various bank withdrawals, issuing checks, and cashing annuities, unlawfully taking $114,889.34. Also during this time, the defendant, John Robbins, Jr., knowingly permitted the victim's medical condition to worsen without seeking appropriate care for her, leaving her with multiple sores on her legs and without utilities. The defendant was previously convicted of a felony [growing marijuana for personal use] and released from service within five years prior to the date of this offense.

Tr. 433-434, APX pt. 1 at 28-29.

John Robbins' actual conduct identified in the statement of facts consists of "utilizing [his mother's] funds for his own purposes,... permitt[ing] [his mother's] medical condition to worsen without seeking appropriate care for her, [and] leaving her with multiple sores on her legs and without utilities." These are all phrases that can, and in this case do, refer to fully lawful conduct. *See*

APX pt. 2 at 9-24, 34-39. More importantly, they do not satisfy the elements of the two statutory offenses of ***5** exploitation, KRS 209.990(5) and criminal neglect, KRS 209.990(2) [3]. By tacking on the incorrect legal characterizations "unlawfully" and "**financially** exploited" [4] the Commonwealth performed the *bait and switch*, causing deliberate confusion of the lawful acts actually done by John Robbins with criminal acts that he never committed, but for which he now serves a ten-year sentence.

The statement of facts includes an artful use of colorful detail to generate an illusion of criminal neglect. Although "multiple sores on her legs" conjures images of bed sores due to a caregiver's neglect, Harriet Robbins never had bed sores. She had a hereditary condition of cellulitis which periodically flared up to cause ugly looking sores. A significant flare up occurred while John Robbins was out of town for two days. By a surprising coincidence utilities were shut off due to late payment of a bill six hours before police arrived. Service was restored later that day. See Affidavits of John ***6** Robbins and Rebecca Lee Schone, APX pt. 2 at 12-13, 19-20. Neither the shut off of utilities nor the delay in seeking medical care had anything to do with lack of resources

The Commonwealth has never maintained, and in fact it is not true, that Harriet Robbins lacked the capacity to decide to go the hospital or a physician and could not telephone a taxi or ambulance to take her. She had been taken to doctors on several occasions, APX pt. 2 at 21-24, and could easily have gone for additional appointments. But she was at times loathe to seek medical care, which is why Jefferson County Adult Protective Services originally classified the case as one of self-neglect.

Nevertheless, by conducting the entire prosecution of John Robbins without divulging anything about how he "allowed [his mother's] condition worsen" or explaining how its allegations fit within the statutory definition, the Commonwealth invited confusion that allowed John Robbins' innocent conduct to be conflated with other, more legally culpable ways in which a victim's condition might be "allowed to worsen."

The Commonwealth's other way of defending the bait and switch prosecution involves a type of legerdemain in legal argument contained in the following well-written passage from Appellees' brief:
Kentucky courts have held that an indictment is sufficient if it informs the accused of the specific offense with which he is charged and does not mislead him. *Wylie v. Commonwealth,* 556 S.W.2d 1, 2 (Ky. 1977). The indictment need not detail the essential elements of the charged crime, so long as it "fairly informs the accused of the nature of the charged crime [.] *Thomas v. Commonwealth,* 931 S.W.2d 446, 449 (Ky. 1996). A failure to charge an offense may be raised "at any time during the proceedings." RCr 8.18. However, all other defects in the indictment, such as failure to comply with RCr 6.10, must be "raised only by motion before trial." RCr 8.18. As further explained by the Supreme Court of Kentucky in *Thomas,* 931 S.W.2d at 449:
***7 All that is necessary to 'charge an offense,' as required by RCr 8.18, is to name the offense."**

Appellee's Brief at 11 (emphasis supplied in that brief). According to this interpretation there are two sources of rights for defendants-one, which comes from RCr 6.10, allows the defendant to know what crime he is being charged with and what he has done to warrant prosecution; the other, which comes from RCr 8.18, simply allows him to know the statutes under which he is being charged. This interpretation essentially legalizes bait and switch prosecutions in Kentucky because once a defendant has taken the bait and been scammed into entering an Alford plea that acknowledges his actual, lawful conduct but authorizes his conviction for criminal conduct he did not do, he "waives" his right to know whether he in fact did anything that actually violated the statute.

However, this interpretation is incorrect because the precedents relied upon by Appellee have all been crafted to avoid endorsing violations of due process, and bait and switch prosecutions are plainly unlawful under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Absence of Valid Charges during All Phases of the Prosecution

In one respect Kentucky's laws do allow the prosecution more leeway than exists in the federal system. Indictments that are insufficient under RCr 6.10 can initiate valid prosecutions as long as the defects are cured somewhere along the line before judgment is entered and do not facilitate violations of due process as occur with bait and switch prosecutions. In this case the defects were never cured. There were four points at which John Robbins could have been "fairly inform[ed] of the nature of the charged crime." Here is what happened with each of the four:

8 1.** ***The Indictment

Result: Indictment filed quoting language of three statutes, providing no information about Defendant's conduct or when it occurred, other than that it occurred on some unknown day or days within a 360, 400 or 420-day period. (APX pt. 1 at 44-48).

2. ***Recording of grand jury proceedings***

Result: Circuit Court ordered on June 25, 2007 that it be provided (APX pt. 1 at 50-51); Commonwealth defied the order and provided nothing; Hon. Irv Maze held on September 14, 2009 that providing it would violate Kentucky's Open Records law. (*Id.* at 36-37).

3. Bill of Particulars

Result: Circuit Court ordered on June 25, 2007 that it be provided (Id. at 50) and that it "advise the Defendant with specificity of the circumstances of the alleged offense(s), including but not limited to exact date, time and location of the offense(s) alleged ... [and] the specific acts of conduct by which the Defendant is alleged to have committed the offense(s) including, but not limited to, the particular culpable mental state of the Defendant." Id. The Commonwealth defied the Order and provided nothing. The Hon. Irv Maze ruled on September 14, 2009 that "any efforts to obtain additional discovery in the defendant's post conviction proceedings be and the same is hereby denied."

4. Statement of Facts presented at plea colloquy

Already discussed at 1-6, *supra.*

***9** Based on the above John Robbins had insufficient information to enter a knowing and intelligent plea to anything. His attorney advised him that the prosecution could probably bury him with 1,600 pages of discovery, but said nothing about what the discovery contained and did not bother to print out any hard copy so that Robbins could examine it for himself. Over a year after Robbins had been sentenced the Commonwealth was finally persuaded to file three CDs containing the 1,326 pages of discovery. Ninety-seven percent (97%) of the pages were simply irrelevant-extensive bank records showing that Harriet and John Robbins had substantial assets, records of Harriet Robbins' progress in the nursing home, photographs of John Robbins taking money out of an ATM machine with a duly authorized bank card for his own personal account, and results of various medical tests pertaining to disabilities associated with aging. The 1,326 pages, which are contained on three compact disks filed with the Circuit Court, appear to contain nothing that supports any of the three charges filed against John Robbins and about a dozen pages of relevant exculpatory information. The exculpatory information includes medical summaries from Baptist East Hospital that revealed no evidence of physical **abuse** or any bed sore or deprivation caused by neglect but a compendium of normal disabilities associated with aging as well as the inherited cellulitis condition. It also includes a Power of Attorney document that explicitly made it lawful for John Robbins to withdraw money from accounts in Harriet's name (APX pt. 1 at 36), and an offense narrative showing that Jefferson County Adult Protective Services had classified Harriet's condition as one of "strictly self-neglect," (APX pt. 1 at 39) and that they were overruled by Detective Fogle on the basis of his idiosyncratic theory that John Robbins' Power of Attorney for his mother made him ***10** strictly liable for any deficiencies in her "quality of

life." (APX pt. 1 at 42). The discovery documented that Harriet's medical conditions had been diagnosed as normal disabilities associated with aging for an 81 year-old woman who smoked and drank wine.

> During the Course of RCr 11.42 and CR 60.02 Proceedings the Commonwealth Confirmed that It Had Engaged in a Bait and Switch Prosecution.

The Commonwealth's response to John Robbins' RCr 11.42 petition, authored by ACA Ryane Conroy simply confirmed that his prosecution for ostensibly neglecting his mother was based on something other than the actual criminal offense of neglect. The Commonwealth's response specifically acknowledged that John had not caused any injury to his mother and stated that it was "irrelevant" whether she had consented to his bank withdrawals. The response specifically stated that while being prosecuted John Robbins "was alleged to have allowed his mother's condition to worsen, not to have caused his mother's underlying medical condition." Response filed October 7, 2009 at 13. The response also noted that John Robbins PSI had erroneously stated "defendant caused the victim's injuries" and that defendant's "counsel had corrected the PSI on the point of whether the defendant caused the victim's injuries..." Id. at 20. The statutory definition of "neglect" clearly requires that a defendant's neglect have caused medical injury to the victim by depriving him of "goods or services that are necessary to maintain his health or welfare."

During the initial RCr 11.42 proceedings the Commonwealth acknowledged that Harriet Robbins had legally authorized her son's withdrawals, but took the radical position that her consent to his withdrawals of money and the Power of Attorney ***11** document that explicitly authorized bank withdrawals were "irrelevant to the continued prosecution" of John Robbins. Response at 9. See entire passage quoted on page 7 of Appellant's brief in companion appeal, 2009-CA-2178. Thus the Circuit Court and Commonwealth's Attorney reshaped (at least for John Robbins) the laws against theft and exploitation to encompass gifts or sharing freely allowed by a competent adult [5] who had not been subjected to any deception or intimidation.

After it became clear that the Commonwealth had based John Robbins' prosecution on newly conjured pseudo-laws (e.g., theft notwithstanding consent of owner; exploitation based on intended use of freely given assets; criminal neglect based on short-term absence from the home) rather than the actual statutes it had quoted in the indictment Robbins filed a CR 60.02 motion seeking reconsideration of Judge Maze's denial of the RCr 11.42 petition. The Commonwealth responded by relying on something it called "11.42 law" which it contended would bar any consideration of due process violations arising from a failure to present valid criminal charges over the entire course of a criminal prosecution. As forcefully stated by ACA Ryane Conroy:

> Whether or not charges were in fact there in the original indictment and bill of particulars, all that is irrelevant to an 11.42 proceeding and it ***12** certainly is irrelevant to a successive 11.42 proceeding... So we are operating under 11.42 law which the Court correctly applied. If he wants an 11.42 and you want me to respond in writing to another 11.42 I'll do it. I'll say the same thing I did last time. The issues have not changed. There is nothing new raised in this. I object to a hearing. We don't need a hearing. We don't need to put any more issues on the record.

Video recording at 2:54-2:58 contained in APX pt. 2 at 40 and transcript contained in APX pt. 2 at 26-33. Judge Maze quickly followed this statement by asking what was new and then dismissing obvious due process violations as not being new enough to warrant consideration. *Id.* at 30.

Inadequacy of the Circuit Court's Opinions Denying Relief Pursuant to RCr 11.42

With the RCr 11.42 motion, the CR 59.05 motion for reconsideration and the CR 60.02 motion, Judge Maze had three opportunities to address the obvious unconstitutionality of John Robbins' *bait and switch* prosecution. With the second and third he did nothing other than state that he would not consider the matter again because he had already considered it previously. With the first he responded in the same way to the entire due process issue, saying simply that the trial judge had made a "finding"

that was exactly on point, namely that defendant Robbins' plea was knowingly and voluntarily given." (APX pt. 1 at 32). Judge Maze did not reach the question of whether there had been any factual basis for the "on point" finding.

The first thirteen pages of Judge Maze's fourteen-page opinion consisted of a transcript of the plea colloquy and statement of when the indictment, guilty plea and sentence were entered. In the final page he quoted the Strickland v. Washington standard and dismissed ineffective assistance of counsel without even acknowledging a single one of the several specific complaints with counsel performance that had been ***13** pled. (See APX pt. 1 at 32-33 and compare APX pt. 1 at 12-16, 65 et. seq. (document pages 20-23, 26-29). Judge Maze's consideration of all the issues raised included no citations to the record, and offered only the following anaysis regarding ineffective assistance of counsel:

> The record is replete of actions taken by previous Defense counsel. The record is apparent that arguments were made by previous counsel that reflect proper investigation on behalf of the Defendant and documents given to the sentencing Court that reflected an orchestrated effort to gain the Defendant's release... [T]he defendant received competent representation that resulted in the defendant receiving a much reduced sentence that (sic) he received. (APX pt. 1 at 33).

The only efforts on Robbins' behalf that appear in the actual court record (APX pt. 2 at 3-8) are a post-conviction motion for shock probation, apparently filed without supporting memorandum, and an agreed-bond order, in the event Robbins were to be released, which he never was. The Case History shows 69 filings or events during the period of Defense counsel's representation of Robbins. No memoranda or argument on Robbins' behalf appears to have been filed by defense counsel. Id. At the September 11, 2007 plea colloquy Robbins' counsel cut short the Court's request that a factual basis for charges be placed on the record by responding, "l do so stipulate a factual basis, Your Honor." (APX pt. 1 at 29). At the March 5, 2008 sentencing hearing defense counsel made various rambling arguments but seemed to focus largely on John Robbins' lack of caring about money and the ease with which it could be taken from him. Five months later Harriet Robbins passed away and the efforts to divert John Robbins' inheritance commenced.

Regardless of defense counsel's intentions or motivation, it would be difficult to find a more transparent acceptance of the practice of conducting bait and switch ***14** prosecutions than what occurred with the Jefferson Circuit Court in this case. In light of this record and the Commonwealth's and Judge Maze's consistent refusal to abide by constitutional norms or the requirements of RCr 11.42, subsections 2 (inappropriate use of summary dismissal), 5 (failure to require controverting of specific allegations and order a hearing) and 6 (failure to "make findings determinative of material issues of fact"), the Court of Appeals should not remand this case to Judge Maze. It should vacate John Robbins' conviction and sentence forthwith. The Argument, infra, will focus on why this is a correct result under the laws of Kentucky.

ARGUMENT

I. The Purpose of Kentucky's Liberal Standard Regarding Pleading of Elements in an Indictment Is Not to Encourage the Fundamental Violations of Due Process that Would Become Commonplace if the Commonwealth's Various "Waiver" Arguments Were Accepted, But to Allow Flexibility Regarding the Point at Which an Intelligible Charge is Presented to the Defendant.

On Appeal the Commonwealth seeks to affirm a *bait and switch* prosecution by quoting applicable law and omitting mention of facts showing that it was a *bait and switch* prosecution. Although this offers a covert way of disregarding serious due process violations, it is not a fair statement of the law in Kentucky. The Kentucky Supreme Court has consistently sought to uphold established national norms of due process and has crafted its opinions with this in mind. Hence its overruling of *Stark v. Commonwealth*, 828 S.W.2d 603 (Ky. 1992) by *Thomas v. Commonwealth*, 931 S.W.2d 446 (Ky. 1996) was never intended to allow an *Alford* or overt guilty plea to be ***15** accepted and entered without the defendant being fairly informed of how he had violated the law.

Thomas itself makes this clear by including the language quoted on page 11 of Appellee's brief- the charging documents must "fairly inform the accused of the nature of the charged crime," 931 S.W.2d at 449, and "not mislead him." *Wylie v. Commonwealth*, 556 S.W.2d 1, 2 (Ky. 1977). Thus it is not permissible to solicit an admission that the defendant used freely shared family assets "for his own purposes," and treat it as a confession that he obtained money from his mother "by deception, intimidation, or similar means, with the intent to deprive [her] of those resources." KRS 209.020(16). Over the course of the entire prosecution the Commonwealth never alleged that there had been any "deception," or "intimidation" of Harriet Robbins. So it cannot fairly base a conviction on an unspoken assumption that this must have occurred-especially since it never did. Harriet had already decided to bequeath her entire $1.4 million to her son John and was simply letting him take about a tenth of it a couple years early. *See* APX pt. 1 at 6-7 and hearing Harriet Robbins recording at APX pt. 2 at 39. In light of the affidavits attesting to the absence of deception or intimidation, it is clear that John Robbins must have been misled when he pleaded guilty to an offense that had "deception, intimidation or similar means" as its main element. No honest recounting of the facts of John Robbins' prosecution can say that he was not misled. See pages 1-6, *supra*, regarding misleading nature of criminal neglect charge

Moreover, Thomas relied on RCr 6.12 (indictment not to be deemed invalid or be grounds for setting aside judgment based on any defect "that does not tend to prejudice ***16** the substantial rights of the defendant on the merits."). This rule was deemed determinative because Thomas "was on notice of the specific crime charged," the "indictment was not misleading," and Thomas "failed to demonstrate any way in which he was prejudiced by the defect in the indictment." 931 S.W.2d at 450.

Other Kentucky Supreme Court cases have also made clear that Thomas was never intended to allow either bait and switch prosecutions or convictions that proceed all the way to judgment without the defendant being told what he has done. In Casey v. Commonwealth, 994 S.W.2d 18,22 (Ky. 1999) the Court acknowledged that there could be some cases where a mechanical application of Thomas could "violate due process," but concluded that in Casey the bill of particulars had cured the problem. This contrasts with the instant case where no bill of particulars was filed. Casey stressed that the "change in the law announced in Thomas deals with a procedural issue, not a substantive right." The substantive due process right includes freedom from being subjected to bait and switch prosecutions facilitated by keeping the defendant in the dark about how he has violated a statute.

II. Appellee's "Waiver of RCr 6.10 Rights" Argument is Defeated by Both the Palpable Error Doctrine of RCr 10.26 and the Established Standards of What Constitutes a Valid Guilty Plea.

A. The Violations of Due Process Were Sufficiently Egregious as to Constitute Palpable Error.

The fact that John Robbins' indictment provided no information about what he had done was important in two ways. First, the Commonwealth's overall strategy in the ***17** case of providing no information in the indictment, defying the court's order to file a bill of particulars, and then pressing for a guilty plea by misrepresenting the elements of the three statutory offenses violated due process in a way that was so egregious and prejudicial as to constitute palpable error under RCr 10.26.

Under that rule "in order to demonstrate an error rises to the level of a palpable error, the party claiming palpable error must show a 'probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law."' *Mason v. Commonwealth*, 2011 Ky. Lexis 3 (January 20, 2011) (opinion to be published); *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009); *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006)). At that point a "palpable error which affects the substantial rights of a party may be considered by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." RCr 10.26.

Although demonstrating palpable error normally imposes a heavy burden on criminal defendants, in this case it can be shown easily. Appellant's brief in the companion appeal at 9-15 and Point II B, *infra*, both explain the due process violations that have occurred. The "probability of a different result" is easy to understand because a defendant who knows he has done X and is

tricked into pleading guilty to a crime that requires he have done Y will almost certainly withdraw his plea when he learns that X and Y are different. [6]

***18 B. Irrespective of What Was Said During the Plea Colloquy, Surrounding Circumstances Showed that the Alford Plea Was Unknowing,Unintelligent and Therefore Not Truly Voluntary.**

The paucity of factual information in John Robbins' indictment is also a key part of the "surrounding circumstances" that render Robbins' *Alford* plea unknowing, unintelligent and invalid. A defendant who is induced to plead guilty without even knowing what kind of acts or omissions constitute his alleged criminal conduct is necessarily not acting competently or intelligently. [7] Merely hearing statutory language does not mean that a defendant understands the charges against him. *See McCarthy v. United States*, 394 U.S. 459, 467 (1969) (passage quoted on page 12 of Appellant's brief in companion appeal, 2009-CA-2178). Kentucky's courts have respected this important aspect of due process and repeatedly held that the "validity of a guilty plea must be determined not from specific key words utered at the time the plea was taken, but from the totality of circumstances surrounding the plea." *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 n.2 & 3 (Ky. 2001) ***19** *Centers v. Commonwealth*, 799 S.W.2d 51, 54 n.2 (Ky. App. 1990) (*citing Brady v. United States*). Appellee's brief agrees, at least in the abstract. See brief at 7 quoting *Sparks v. Commonwealth*, 721 S.W.3d 49, 50 (Ky. App. 1986) and *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (1978) ("The validity of a guilty plea is determined **not by reference to some magic incantation recited at the time it is taken** but from the totality of circumstances surrounding it.") (both emphases supplied). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, (2001) (holding that defendant's statements at a Boykin hearing should not be used to deny relief under RCr 11.42 if they "were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment") (quoting *Blackledge v. Allison*,431U.S. 63, 74 (1977)).

However, Appellee presents these correct quotations of the law under a heading titled, "Appellant Entered a Valid Guilty Plea," when nothing in the record indicates it was a knowing and intelligent plea other than a few "pecific key words uttered at the time the plea was taken." Appellee, like Judge Maze, appears to treat those words as a "magic incantation" that will allow affirmance without any acknowledgment that this was clearly a bait and switch prosecution. The Commonwealth correctly quotes the law to preserve an appearance of legality while asking the Court of Appeals to help evade it.

C. Due Process Was Also Violated Because Appellant's Sentence Rested on a Foundation that was Extensively and Materially False.

Even if there had been no violation in accepting the guilty plea, there would still be a significant due process violation in the judge basing John Robbins' sentence on ***20** misleading statements in the Commonwealth's Statement of Facts. The importance of the Statement of Facts was magnified by the absence of any other information about what the defendant had done. Yet it was an artfully constructed narrative designed to generate the erroneous impressions that John Robbins had left his millionaire, consistently attended mother-who later insisted that he had been attentive and had not **abused** her (APX pt. 2 at 39)-- alone in a house with bed sores and deprived her of electricity by running off with all her money. See APX pt. 2 at 3-6, 18-24. During the March 5, 2008 sentencing hearing the Commonwealth studiously avoided mentioning what John Robbins had done or failed to do, but simply repeated the phrase the horrific facts of this case," emphasized that there were "not enough years to actually express the seriousness of the offense," and stated falsely that Mrs. Robbins was "too incompetent to give testimony." ACA Todd Lewis' defamed John Robbins by saying, **"trafficking in drugs is all he has ever done."** Robbins, who was an auto mechanic by trade who had once been convicted of growing personal use amounts of marijuana, had never been a drug trafficker. Nevertheless, ACA Lewis likened Robbins to an "orphan who killed his own parents and wants the mercy of the courts," and promised to write letters stating that Robbins should not be paroled. Video record of March 5, 2008 proceedings at 10:21 to 10:31 a.m.

The ensuing sentence rested on a foundation that was "extensively and materially false." *Townsend v. Burke*, 334 U.S. 736, 741 (1948). "Such a result, whether caused by carelessness or design, is inconsistent with due process of law." *Id.* "*Townsend* and

its progeny are generally viewed as establishing a due process ***21** "requirement that a defendant be afforded the opportunity of rebutting derogatory information demonstrably relied upon by the sentencing judge, when such information can in fact be shown to have been materially false." *See also Arnett v. Jackson,* 393 F.3d 681, 686 (6th Cir.) (noting the general rule that a violation of due process exists when a sentencing judge relies upon erroneous information"), cert. denied 546 U.S. 886 (2005).

III. The Unconstitutionality of John Robbins' Conviction and Sentence Are So Readily Apparent on the Face of the Record and from the Clear Divergence Between Statutory Definitions and the Commonwealth's Idiosyncratic Interpretations of Laws Against Exploitation, Neglect and Theft, that His Conviction Should Be Set Aside Without Remand to the Circuit Court and Without Requiring Any Evidentiary Hearing.

A. There Is Nothing in the Record to Challenge the Plain Fact that this was a Bait and Switch Prosecution, which is a Clear Violation of Due Process.

To verify that John Robbins' conviction of the "exploitation" charge stemmed from a bait and switch prosecution one need only look at two documents-Commonwealth's statement of the facts of the case, quoted in full at 4, supra, and the statutory definition of the exploitation offense, KRS 209.020(9). Neither of these documents could be altered by holding an evidentiary hearing.

On the theft charge one need merely compare John Robbins' legally valid Power of Attorney document and Harriet Robbins' statements about John's authorization to withdraw money from her accounts with established case law documenting that non- ***22** consent of the owner is an essential element of any theft charge. Again, neither of these is going to change.

Things are slightly murkier on the "neglect" charge, but still clear enough to conclude without any evidentiary hearing that John Robbins could not lawfully have been convicted of true criminal neglect. The following points are relevant:
1. Harriet Robbins did not view her son John as her caretaker.

2. Harriet Robbins had a different, paid caretaker, Rebecca Schone, who was with hter the entire time when John Robbins is alleged to have left his mother alone.

3. The legal reasoning by which Detective Fogle inferred from the Power of Attorney document that John Robbins was "a health care surrogate responsible for his mother's quality of life" is unsound and the entire case record contains no other explanation of how the Commonwealth came to deem John Robbins to be Harriet's caretaker within the meaning of KRS 209.990(2).

4. The "multiple sores" on Harriet Robbins' legs were an inherited condition according to her, and there is no other allegation of injury caused by neglect.

5. There is a sharp variance between the statutory definition of criminal neglect and the various descriptions of the offense to which John Robbins pled guilty. All seemed to center on his passivity and the fact that he did not cause her medical injury. It may have been "clearly understood by all parties" that John Robbins did not "cause any medical injury" to his mother (APX pt. 2 at 25), but this creates a quandary over how he could have been charged with criminal neglect.

B. Defense Counsel's Failure to Demand Compliance with the Court's Bill of Particulars Order, His Erroneous Stipulation that there was "a Factual *23 Basis" for the Charges, and His Refusal to Pass Along the Alleged Crime Victim's Exculpatory Statements to His Client or the Court Each Constituted a Clear Instance of Ineffective Assistance of Counsel.

There appears to be no dispute over the standard for setting aside a guilty plea and judgment because of ineffective assistance of counsel. *Strickland Washington* 466 U.S. 668, 688 (1984) holds that Appellant "must show that counsel's representation fell

below an objective standard of reasonableness." and that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Because John Robbins conviction stemmed from his entering an ill-advised *Alford* plea, he must show that he pled guilty because of erroneous advice or counsel's objectively unreasonable performance. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). John Robbins must show:

> (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1985). *See also Sparks v. Commonwealth*, 721 S.W.2d 726, 727-728 (Ky. App. 1987).

When faced with an uninformative indictment and the Commonwealth's simple defiance of the Court's Order that it file a bill of particulars, both of which are compounded by clear variance between statutory definitions and idiosyncratic theories underlying the prosecution, it is certainly "outside the wide range of professionally ***24** competent assistance" to do what John Robbins' trial attorney did. He simply allowed the Commonwealth not to file the bill of particulars and stipulated to the existence of a factual basis for the charges without even informing his client what the alleged factual basis was. Also, where the alleged crime victim has just two months before given defense counsel a nine-minute recording in which she protests the defendant's innocence and denies that any alleged offense occurred, it is "outside the wide range of professionally competent assistance" not to let her testify and to withhold the recording from both the Court and his client.

There is a "reasonable probability" that if defense counsel had done any one of these three things differently- demand that the bill of particulars be filed, not voluntarily stipulate to the existence of an unknown factual basis without even considering the charged crimes statutory definitions, and not conceal the exculpatory statements provided by the alleged crime victim-that John Robbins "would not have pleaded guilty, but would have insisted on going to trial," and would have moved to dismiss the indictment.

No evidentiary hearing is needed to conclude that this was ineffective assistance of counsel[8] because all these facts can be determined on the face of the record." RCr 11.42(5). Relying on the language of RCr 11.42(5) and the Kentucky Supreme Court's decision in *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001) (condemning practice of using plea agreements to conceal deception instigated by the Commonwealth), the Court of Appeals has recently vacated a conviction and judgment without ordering any ***25** evidentiary hearing where it was apparent from the record itself that defense counsel's actions "fell below an objective standard of reasonableness, and thus constituted ineffective assistance. *Hatcher v. Commonwealth*, 310 S.W.3d 691, 701-702 (2010). In the instant case the Court of Appeals need only examine the indictment and Circuit Court Order of June 25, 2007 (APX pt. 1 at 44-51), note the absence of any filed objection to proceeding without a bill of particulars, take cognizance of defense counsel's stipulation of a factual basis and compare the statutory definitions of the offenses with the Commonwealth's Statement of Facts to conclude that John Robbins' Sixth Amendment right to effective assistance of counsel was violated. None of these glaring facts could be changed by testimony at a hearing. Hence there is no need to remand for a hearing in order to conclude that Robbins conviction must be set aside because it was obtained in violation of due process and without effective assistance of counsel.

Conclusion

For all the above reasons Appellant John Jackson Robbins, Jr., needs to have his plea, conviction, judgment and sentence set aside immediately upon conclusion of this appeal and be released from prison forthwith.

Footnotes

1 The instant brief has sought to counter several factual distortions even though such clarification is not strictly needed to obtain the relief sought. Because John Robbins' trial counsel did not mount any active defense and the Hon. Irv. Maze denied the RCr 11.42, CR 59.05, and CR 60.02 motions without allowing any hearing or even argument addressing the substance of what had occurred, the only form in which testimony could be provided was by verified RCr 11.42 petition and affidavits. Affidavits addressing the factual circumstances that were insinuated but never clearly stated in the Commonwealth's Statement of the Facts of the Case have been provided by John Robbins, by Harriet Robbins' actual caretaker, Rebecca Lee Schone, and by Mary M. Eitel, a **financial** analyst family friend in frequent contact with Mrs. Robbins during 2007-2008. Harriet Robbins, who herself had passed away six months before John Robbins obtained post-conviction counsel, can be heard only through the vehicles of a nine-minute recorded statement that she prepared for her son's trial counsel on July 14, 2007 and by a letter that Ms. Eitel prepared at her direction, dated December 16, 2007. A compact disk containing the Harriet Robbins recording, the John Robbins Affidavit dated September 21, 2010 and the Rebecca Schone Affidavit dated September 17, 2010 are contained in the Appendix annexed hereto (" APX pt. 2") at 34-39, 18-25, 9-17, respectively. The verified RCr 11.42 petition, December 16, 2007 letter and Eitel Affidavit are contained in the Appendix annexed to Appellant's brief in the companion appeal, 2009-CA-2178 (" APX pt.1" at 1,64 and 55, respectively).

2 John Robbins' confusion about why he was being tried was used to persuade him that jury trials had substantial elements of randomness and that he would be better off cooperating with the prosecution by acknowledging what they could prove, which would probably lead to his being given probation and allowed to see his mother, as opposed to possibly facing a twenty-year sentence after trial.

3 The statutory definition of criminal neglect found in KRS 209.020(16) states: "Neglect" means a situation in which an adult is unable to perform or obtain for himself or herself the goods or services that are necessary to maintain his health or welfare, or the deprivation of services by a caretaker that are necessary to maintain the health and welfare of an adult.

4 The term "unlawfully" was simply incorrect because it is not against the law either to allow an **elderly** person to make her own decisions about medical care or to accept freely offered gifts constituting an advance of about ten percent of the inheritance that John Robbins was due to receive. The term "**financially** exploited" was ambiguous but clearly misleading to Robbins by either meaning. Insofar as it referred to the actual crime of "exploitation of an adult," KRS 209.990(5), it misstated the offense by substituting the legally irrelevant concept use for one's *own purposes for the actual element, obtaining assets by deception or intimidation.* Insofar as it referred to a more colloquial use of the term "exploited" (e.g., a child "exploits" his grandparents' love by getting them to buy him lots of candy), it plainly was not referring to any actual criminal offense.

5 The Commonwealth in its Statement of Facts alleged that Harriet Robbins was "mentally disabled," which John Robbins could not contest because he had been prevented from having any contact with his mother for the greater part of a year. Other than mild memory loss associated with either aging or the very early, non-debilitating stages of Alzheimer's disease, this allegation was plainly untrue. See Eitel Aff.1-15, APX pt. 1 at 55-61; Schone Aff. ¶ 5, APX pt. 2 at 11; Robbins Aff. ¶¶6-7, APX pt. 2 at 21-22; Also hear nine-minute recording of Harriet Robbins speaking for nine minutes less than two months before John Robbins' plea colloquy. On CD at APX pt. 2 at 34-39.

6 For a compelling first-hand account of how John Robbins was misled by the way his prosecution was conducted see his verified RCr 11.42 petition, ¶¶ 2-6, 11-13, APX pt. 1 at 2-12. For additional corroboration that he could not possibly have been guilty of theft because he had a valid Power of Attorney, see APX pt. 1 at 38; for first-hand corroboration that his level of care for his mother came nowhere near approaching the standard for criminal neglect see Affidavit of Rebecca Schone, APX pt. 2 at 12-13, Affidavit of John Robbins, APX pt. 2 at 18-24, and recorded statement and letter of Harriet Robbins, APX pt. 1 at 64, APX pt. 2 at 39, and see quotations from Appellant's Brief in companion appeal 09-CA-2178 at 4-6; and for corroboration that Harriet Robbins had shared the family wealth with John freely and without any deception or intimidation see APX pt. 1 at 6-7, 55-56, 60-61; APX pt. 2 at 11-14.

7 In contrast to someone who **abuses** an infant, who will likely know what he did even if his indictment does not specify a date or precise act, an adult son who lives and shares assets with his mother for years is apt not to know what is meant by "exploitation" and "neglect" in the context of their relationship.

8 Additional grounds for finding ineffective assistance of counsel that probably would require an evidentiary hearing are set forth at APX pt. 1, page 65 *et. seq.*